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UNITED STATES OF AMERICA

15 UNITED STATES DISTRICT COURT

16 FOR THE CENTRAL DISTRICT OF CALIFORNIA

17 UNITED STATES OF AMERICA,

18 Plaintiff,

19 v.

20 RAMI NAJM ASAD GHANEM,
21 aka "Rami Ghanem,"

22 Defendant.

No. CR 15-704(A)-SJO

GOVERNMENT'S MOTION TO PRECLUDE
IMPROPERLY NOTICED AND IRRELEVANT
DEFENSE WITNESS

Hearing Date: 10/22/2018

Hearing Time: 10:00 a.m.

Location: Courtroom of the
HON. S. JAMES OTERO

23
24 Plaintiff United States of America, by and through its counsel
25 of record, the United States Attorney for the Central District of
26 California and undersigned counsel, hereby files its motion to
27 preclude an improperly noticed and irrelevant defense witness.
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The government hereby moves to preclude defendant's public-
4 authority witness, Aref Al Zaben, whom the defendant improperly
5 attempted to notice seven months after the Court-ordered deadline and
6 long after the extensive litigation as to defendant's noticed public-
7 authority defense was completed. Apart from the late timing, the
8 witness's testimony would likely be irrelevant in light of the
9 Court's determination, after extensive litigation, that defendant
10 would be barred at trial from offering evidence in support of the
11 affirmative defense of public authority. (CR 265) Moreover, if any
12 information that defendant intends to offer through the noticed
13 witness — a Jordanian general with close ties to the U.S. military
14 who previously commanded a military facility constructed and funded
15 by the United States — were classified, the Classified information
16 Procedures Act (CIPA) imposes obligations on both parties¹ that might
17 conceivably compel a delay of the October 30 trial date.

18 **II. FACTS**

19 On January 31, 2018, at the request of both parties and based on
20 considerations relevant to the Classified Information Procedures Act,
21 the Court issued a detailed scheduling order setting forth an
22 interdependent set of deadlines by which defendant must provide
23 notice of intent to pursue a defense of actual or believed public
24 authority pursuant to Rule 12.3, notice of witnesses related to that

25 _____
26 ¹ One of those obligations is the requirement that defendant
27 provide notice of his intent to disclose classified information
28 pursuant to CIPA Section 5. The Court-ordered deadline to do so has
long passed, and defendant has provided no notice related to this
witness.

1 defense, notice of intent to use classified information and other
2 required milestones in this complex case.² (CR 132)

3 On February 22, 2018, pursuant to the scheduling order and the
4 agreed-upon deadline, defendant filed a notice pursuant to CIPA
5 Section 5. (CR 136) On April 9, 2018, the government filed its
6 response, which specified that based on defendant's Section 5 notice,
7 the government did not anticipate that pretrial or trial proceedings
8 in this case would involve classified information. (CR 171) Thus,
9 there have been no further proceedings involving CIPA in this case.

10 On February 23, 2018, pursuant to the scheduling order and the
11 agreed-upon deadline, defendant provided notice of his intent to
12 offer a defense of actual or believed public authority pursuant to
13 Rule 12.3. (CR 137) Rule 12.3 required that defendant's notice
14 specify: 1) the law enforcement agency or federal intelligence agency
15 on whose behalf defendant claimed to have acted, 2) the agency member
16 on whose behalf defendant claimed to have acted, and 3) the time
17 during which defendant claimed to have acted. Defendant's notice
18 listed one U.S. agency, namely "Homeland Security ICE," and one
19 individual, namely a source of information (SOI) used by the
20 government to introduce the undercover agent to defendant, as the
21 "agency member." No other U.S. agencies were identified as purported
22 sources of actual or believed public authority for defendant's
23 criminal violations. Defendant's notice also listed a foreign
24 entity, namely "Libyan Defense Ministry/Crisis Operations Management
25 Room," and agency members as "Prime Minister Khalifa al-Ghawil and
26

27
28 ² On February 27, 2018, and March 26, 2018, the Court issued
modified scheduling orders with changes not directly relevant to the
instant motion. (CR 134, 148)

1 members of the Libyan Defense Ministry/Crisis Operations Management
2 Room."

3 On April 2, 2018, after failing to provide the notice of all
4 witnesses on whom his actual or believed defense of public authority
5 would rely, as required by Rule 12.3 and the Court's prior order, and
6 after the Court issued a second order again requiring such notice,
7 defendant provided notice of twelve witnesses whose testimony he
8 intended to offer in support of his defense of public authority. Mr.
9 Al Zaben's name was not on this list. In reliance on that mandatory
10 witness list, the government provided its own list of responsive
11 witnesses by the Court-ordered deadline of April 16, 2018. (CR 172)

12 On April 23, 2018, relying on the required defense notice and
13 witness list and in accordance with the Court's scheduling order, the
14 government moved to preclude the defendant's noticed defense of
15 public authority. (CR 177) In his opposition to that motion on May
16 14, 2018, defendant articulated two theories of actual or believed
17 public authority: first, that he relied on members of a Libyan
18 faction competing for control of the government of Libya in
19 authorizing him to violate U.S. law; and second, that he relied on
20 purported authority allegedly conveyed by the SOI. (CR 223)
21 Defendant never mentioned Mr. Al Zaben in his opposition papers or in
22 his argument. The government filed a reply brief on May 21, 2018.
23 (CR 228)

24 At the hearing on this motion on June 8, 2018, the Court
25 questioned defendant's counsel at length as to whether defendant had
26 any understanding or belief that the charged conduct was sanctioned
27 by the U.S. government, and whether defendant could identify any
28 source of purported public authority for his violations of U.S. law

1 other than Khalifa Al Ghawil, then the self-styled prime minister of
2 the Libyan faction to whom defendant endeavored to sell weapons and
3 ammunition. (CR 268, pp. 31-37) After the Court specifically
4 directed defense counsel to confer with defendant on the
5 representations being offered on defendant's behalf and in his
6 presence at the hearing, defense counsel asserted that Mr. Al Ghwail
7 was the only individual on whom defendant had purportedly relied in
8 believing that the charged conduct was sanctioned:

9 COURT: "Okay. So just to be very specific, who do
10 you precisely contend had the actual
11 authority to permit Mr. Ghanem to violate
U.S. law, allegedly?"

12 MR. STEWARD: "Khalifa Al-Ghawil, the former prime
13 minister of Libya, one of the folks we want
to depose."

14 COURT: "Separate and apart from that person, anyone
15 else?"

16 MR. STEWARD: "Mr. Khalifa had the authority so far as my
17 client was concerned, so he didn't need it
from anybody else."

18 COURT: "So are you - can you identify any U.S.
19 official whom you believe or your client
20 believes had actual authority to permit him
to violate U.S. law?"

21 MR. STEWARD: "No, Your Honor."

22 (CR 268, p. 36-37)

23 In a written order dated June 21, 2018, the Court granted the
24 government's motion to preclude defendant's noticed public-authority
25 defense. (CR 265) Finding that the SOI had no actual authority to
26 sanction defendant's crimes, the Court held that defendant was
27 precluded from premising an affirmative defense of public authority
28 on his contact with the SOI. (Id.) The Court further held that

1 defendant was precluded as a matter of law from presenting a defense
2 that Libyan individuals gave him public authority to commit the
3 crimes charged. (Id.)

4 On Friday, September 28, 2018, the Court-ordered deadline for
5 reciprocal disclosure of witness lists, defendant gave notice of his
6 intent to call a single witness, namely, Mr. Al Zaben. (CR 308)
7 According to open-source media articles, Mr. Al Zaben is a former
8 general in the armed forces of Jordan and the former commander of the
9 King Abdullah Special Operations Training Centre (KASOTC). KASOTC is
10 a counterterrorism and special-operations training facility that was
11 primarily constructed and funded by the U.S. military and retains
12 close ties with the U.S. military, including routinely hosting
13 training exercises for U.S. special-operations forces and joint
14 trainings with the militaries of other nations.³

15 On Monday, October 8, 2018, the government sent an e-mail to the
16 defense team requesting an offer of proof as to Mr. Al Zaben's
17 expected testimony. The government's e-mail identified two concerns:
18 1) Mr. Al Zaben did not appear to have any connection to the charged
19 offenses, giving rise to relevancy questions; and 2) given Mr. Al
20 Zaben's background, certain areas of testimony that he might offer
21 could be reasonably expected to implicate classified information, a
22 possibility that at this late juncture would give rise to potentially
23 delay-inducing obligations on the part of both parties.⁴

24
25 ³ See
26 https://asc.army.mil/docs/pubs/alt/2009/4_OctNovDec/articles/62_King_Abdullah_Special_Operations_Training_Center_%28KASOTC%29_Provides_Capabilities_for_Coalition_Forces_200904.pdf

27 ⁴ Because the notice deadline for public-authority witnesses had
28 long passed and the public authority litigation was long-completed,
the government did not anticipate that Mr. Al Zaben would be called
for that purpose.

1 On Tuesday, October 9, 2018, the defense team replied that it
2 would provide an offer of proof by Thursday, October 11. On Friday,
3 October 12, 2018, during a meeting with government counsel, the
4 defense team stated that it intended to offer the testimony of Mr. Al
5 Zaben to support a defense of public authority. The government again
6 requested a detailed offer of proof as to the specific facts to which
7 the proposed witness would testify. The defense team agreed to
8 gather and provide that information as soon as possible. Later that
9 day, the government sent a follow-up e-mail reiterating its concerns
10 and asking for the information no later than noon on Monday, October
11 15, 2018. On the afternoon of Monday, October 15, 2018, the defense
12 team indicated that it had been unable to reach the witness but would
13 continue trying to do so in order to address the concerns raised by
14 the government.

16 **III. ARGUMENT**

17 Rule 12.3 articulates a clear and detailed procedure that must
18 be followed before a defendant may offer any defense of "actual or
19 believed public authority on behalf of a law enforcement agency or
20 federal intelligence agency." The Court ordered defendant to provide
21 this notice by February 23, 2018, and notice of his witnesses
22 pursuant to Rule 12.3(a)(4)(A) by March 19, 2018, so that the issue
23 could be fully litigated as required by the law. Defendant did
24 ultimately provide the required notices, with no reference whatsoever
25 to Mr. Al Zaben. The parties proceeded to litigate the notice that
26 defendant provided, and the Court ruled on that litigation months
27 ago. Defendant may not now, in the days before trial, identify a new
28 surprise witness supporting a defense of actual or believed public

1 authority that was not subject to the robust, required, and now-
2 completed litigation on this issue.

3 Beyond subverting the clear requirements of the Rules, the
4 Court's orders, and the processes required thereby, defendant's
5 attempt to call a foreign military official with close ties to
6 American special forces in support of an unexplained and unnoticed
7 defense that defendant believed his violations of U.S. law were
8 sanctioned by the U.S. government⁵ could conceivably compel a last-
9 minute and potentially substantial delay in the trial, in the event
10 that Mr. Al Zaben's testimony might implicate classified
11 information.⁶ Defendant's new public-authority witness should be
12 precluded, and the case should proceed to trial on October 30 as long
13 scheduled.

14 **IV. CONCLUSION**

15 For the foregoing reasons, the government respectfully requests
16 that the Court preclude defendant from offering testimony from his
17 improperly noticed and irrelevant public-authority witness.

25 ⁵ As noted above, the Court has already precluded, as a matter
26 of law, defendant from offering a defense that his violation of U.S.
law was sanctioned by foreign officials.

27 ⁶ As defendant has not provided the requested offer of proof,
28 the government cannot seek or offer an informed opinion as to whether
or not Mr. Zaben's testimony would implicate classified information.
Absent such a proffer, whether Mr. Al Zaben would offer percipient,
lay testimony or unnoticed expert testimony is unclear.